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which were *already carrying* a must carry signal on a distant signal basis be permitted to require a promise of reimbursement for royalties due for the post June 2 portion of the period.[3] The cable system in such circumstances already would have determined to carry the signal without regard for reimbursement and should be entitled to no windfall from the station. Therefore, the clarification requested by INTV is completely fair and proper.

II.

NCTA's opposition to INTV's request that stations be permitted to agree to distant signal royalty indemnification agreements for periods shorter than three years is meritless.[4] NCTA criticizes INTV's proposal (and a similar proposal by the National Association of Broadcasters) by stating that "a station could 'opt out' of must carry status during the middle of the three year election period and essentially change its election to retransmission consent."[5] So what? NCTA fails to explain the source of its angst over such an occurrence. INTV doubts that a station which elected must carry, but during the election period ceased agreeing to reimburse a system for copyright royalties, would expect to exploit its theoretical status as a retransmission

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Reconsideration or Clarification, MM Docket No. 92-259 filed June 7, 1993, by the Time Warner Entertainment Company, L.P, at 10, n.8 [hereinafter cited as "TWLP"].

[3]INTV stated:

> Until June 2, cable systems are carrying signals on a purely voluntary basis and *already have assumed liability* for any copyright payments. Therefore, stations should be required to pay no more than a *pro rata* share of the first accounting period for carriage after June 2.

Petition for Reconsideration of the Association of Independent Television Stations, Inc., MM Docket No. 92-259 (filed May 3, 1993) at 5 [hereinafter cited as "INTV PR"].

consent station. NCTA has offered no dread scenario as a basis for its concern about such a default "election" by a station.

In any event, the statute grants stations the discretion to determine whether to perfect must carry rights via agreements to pay incremental distant signal royalties. What INTV has sought is a safety valve for stations who find themselves confronting extraordinary, but unanticipated costs or equally unanticipated financial difficulties. NCTA would force stations to continue agreeing to reimburse copyright costs even if those costs rise above the cable system's original estimates or the station simply no longer could afford them. This forced, extended liability serves no one's interests. The station is forced to agree to bear costs it does not wish to pay. The cable system is forced to assume the risk that the station no longer will be capable of paying. Such risk is a matter of concern to at least one large MSO.[6] Finally, locking stations into a three year commitment would discourage stations from agreeing to reimburse distant signal royalties and, thereby, asserting their must carry rights because they would fear locking themselves in to a three-year agreement with no escape clause in the event of unforeseen circumstances.

Therefore, INTV submits that a hypothetical fear of giving stations a back door entrance to retransmission consent is no basis for unnecessary rigidity in application of §76.55(c)(2).

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[6]*See* TWLP at 8, n.6. INTV's proposal would enhance the level of assurance of cable operators because they would know a station's decision to agree to reimburse royalty payments was informed and voluntary, not compelled by a mandatory three-year term.

III.

Time Warner's suggestion that cable systems be permitted to drop signals already carried despite technical failure to provide a strong enough signal is illogical.[7] Time Warner states:

> Many cable systems that voluntarily carry broadcast stations have invested significant amounts of money in equipment to be able to receive a good quality signal, and such cable operators should not be punished for having made such investments.[8]

Continuing to carry a station that a cable operator already has spent "significant amounts of money" to receive fits no logical definition of punishment. In such cases, the cable system already has decided to carry the signal, and its continued carriage of the station hardly is punishment; it is much more the expected dividend of the cable system's investment in reception equipment.

On the other hand, a mere allegation that the station's signal is inadequate, despite its ongoing carriage, should provide no excuse to drop the station. The entire matter of signal strength under § 76.55 (c)(3) has proven a fertile field for questionable actions by cable operators. Such activity would be condoned and encouraged if a cable system were permitted to drop a signal which it already was carrying on the basis of an allegedly inadequate signal.

Therefore, cable systems should be required to continue carriage of signals already carried regardless of the station's nominal failure to provide an adequate signal.

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[7]TWLP at 12.

[8]*Id.*

IV.

Time Warner and NCTA offer no valid reason to refrain from presuming a station is significantly viewed throughout its ADI.[9] Time Warner initially raises the bugaboo of a heavy administrative burden for the Commission. This is speculative. Stations are unlikely to pursue "significantly viewed" status in areas where they anticipate valid rebuttals to the presumption.[10] Stations will pursue significantly viewed status in areas where they believe they are significantly viewed, but are thwarted in their efforts to satisfy the Commission's stringent criteria by lack of readily available data, the expense of special surveys, etc.[11] Similarly, attempts to rebut the presumption in such circumstances would not be undertaken lightly or frequently. First, either a cable system or station must harbor some genuine desire to force the station to pay and, thereby discourage carriage. Second, they must have some basis for believing that the station is not significantly viewed. Otherwise, they would be reluctant to bear the expense of rebutting the presumption. Thus, Time Warner's speculation is just a specious scare tactic.

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[9]TWLP at 13; NCTA at 3.

[10]INTV's proposal does not envision an automatic, immediate presumption of significantly-viewed status. Stations still would have to request such status, although they would enjoy the benefit of the presumption.

[11]*See* Comments of INTV, MM Docket No. 92-259 (filed January 4, 1993) at 12, Exhibit 2.

Furthermore, as INTV already has emphasized -- and contrary to Time Warner's position -- valid reasons do exist to change the Commission's procedures.[12]

Finally, INTV's proposal furthers the intent of the Act. The Act clearly established the ADI as the area of local carriage. The exception for cable systems required to pay distant signal royalties was designed to sidestep requiring a cable system to pay for carriage of a station it was required to carry. INTV's proposal hardly undoes that scheme. In contrast, it more fully promotes the Act's primary goal of ADI-wide carriage by unburdening cable systems -- and, consequently, stations -- of unnecessary and unjustified distant signal royalties.

Therefore, the Commission should indicate that it will presume that stations are significantly viewed throughout their ADIs.

V.

Congress did not intend to foster disparate treatment of stations in the same community. Time Warner and NCTA oppose INTV's request that if a community is added to a market, every station in the market should attain must carry rights (if so elected) in that community.[13] They claim that INTV's request is contrary to the Act. This is not so. Congress recognized that the adjustment mechanism in §614 (h)(C) might be invoked to provide disparate treatment of stations licensed to the same community and expressly warned against use of the provision to that end:

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[12] *Id.*

> [T]his section is not intended to permit a cable system to discriminate against several stations licensed to the same community. Unless a cable system can point to particularized evidence that its community is not part of one stations market, it should not be permitted to single out individual stations serving the same area and request that the cable system's community be deleted from the station's television market.[14]

Thus, as a general rule, §614(h)(C) should not be implemented in a way which permits discrimination against stations licensed to the same community. At most, the legislative history admits to a narrow exception which employs a high waiver standard for treatment of cable systems on a station rather than community basis.

The language of the statute in no way precludes INTV's proposal, especially in light of clearly expressed Congressional intent. The statute empowers the Commission, but does not require the Commission, to include or exclude a particular station from a market. In and of itself, this hardly bars community-wide inclusions or exclusions.

Therefore, INTV's proposal more faithfully effectuates the scheme Congress intended than the station-by-station approach adopted by the Commission.

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[13]TWLP at 14; NCTA at 4-5.

[14]H.R. Rep. No. 102-268, 102d Cong., 2d Sess., at 98.

VI.

Superstations are entitled to retransmission consent within their local markets.[15] For reasons stated by Tribune Broadcasting and Turner Broadcasting System, as well as INTV, superstations remain eligible for retransmission consent rights in their local markets.[16] Depriving such stations of retransmission consent would be ludicrous in light of the value of their signals and far from what Congress intended.

VII.

INTV concurs with KTFH-TV that noncommercial stations may properly be excluded from the definition of a local commercial television station.[17] KTFH-TV has raised valid concerns about including noncommercial stations under the commercial must carry rules.[18]

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[15]Time Warner has disputed this. TWLP at 15.

[16]Petition for Reconsideration and/or Clarification of Tribune Broadcasting Company, MM Docket No. 92-259 (filed May 3, 1993); Comments of Turner Broadcasting System, Inc., on Tribune Broadcasting Company's Petition for Reconsideration and/or Clarification, MM Docket No. 92-259 (filed June 7, 1993).

[17]*See* Opposition of KTFH-TV, MM Docket No. 92-259 (filed June 7, 1993), responding to Petition for Reconsideration by Colorado Christian University, MM Docket No. 92-259 (filed May 3, 1993),

[18]Notably, the definition of local market included in the statute by Congress excludes noncommercial stations. It is based on §73.3555(d)(iii) of the Commissions Rules and Regulations. However, §73.3555 in its entirety is expressly inapplicable to noncommercial television stations. *See* §73.3555(f).

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June 17, 1993

CERTIFICATE OF SERVICE

I, James J. Popham, hereby certify that I have this 17th day of June, 1993, mailed via first class United States mail, postage prepaid, copies of the foregoing "Reply to Oppositions to Petitions for Rule Making" to the following:

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